No. 11,853

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ARIZONA BARITE COMPANY
(a corporation),
Appellant,

vs.

WESTERN-KNAPP ENGINEERING CO.,
(a corporation),
Appellee.

REPLY BRIEF FOR APPELLANT.

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BRIEF OF ARGUMENT.

Appellant, in reply, argues: (1) that this Court has jurisdiction to entertain and hear an appeal in this matter because the two orders quashing service and return of summons under the facts of this case, as shown from the record, amount to a final decision; (2) that the service of summons on the statutory agent of appellee was effectual because the agent's designation and authority was irrevocable for the purpose of service of process upon appellee upon causes of action arising in the State of Arizona in favor of citizens of that state, and the fact that appellee corporation consummated a limited dissolution in the state of its

domicile before such service would not preclude the commencement and prosecution of this action; and (3) that after the trial Court had granted appellee's motion to quash service of process upon the statutory agent of appellee, the appellant caused service of summons to be made upon the Arizona Corporation Commission under the law of the State of Arizona in order to exhaust its rights under the laws of Arizona, and that, upon the record, such service made complied with the statutes of Arizona.

ARGUMENT.

(1) JURISDICTION.

It is conclusively shown by the record in this case (appellee's affidavit in support of motion to quash service and return of process, T.R. 21-22) that appellee had no officer, employee, or other agent within the State of Arizona upon whom service of process could be made other than its statutory agent, or the Arizona Corporation Commission; that when service was made upon the latter, all possible means of service of process upon the appellee (defendant) within the jurisdiction of the United States District Court in and for the District of Arizona was exhausted, and if the orders of the Court quashing the service and return of process made within the trial Court's jurisdiction are sustained, then there is nothing left for the trial Court to do but to dismiss this action. Under this state of facts, the orders of the trial Court become a final decision in this case.

The case of *Cole v. Rustgard* (CCA 9), 68 Fed. (2d) 316, cited by appellee, contains an entirely different factual situation than in the present case. The case of *In re Melekov* (CCA 9), 114 Fed. (2d) 727, contains a factual situation analogous to the present case. In that case it appeared that none of the twelve defendants could be served with process within the district of the trial Court and it was held that an order quashing service and return of process was a final decision and, therefore, mandamus did not lie to compel the trial Court to hear the matter. Attention is called to the case of *Henderson v. Richardson Co.*, 25 Fed. (2d) 225, which also contained a factual situation analogous to the present case and the distinction is made between that case and the *Cole v. Rustgard* case, supra, and other cases cited in support thereof.

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(2) SPECIFICATION OF ERROR NO. 1.—THE QUASHING OF SERVICE AND RETURN OF PROCESS UPON STATUTORY AGENT.

Under the above specification of error, appellee takes the position that after its withdrawal from the State of Arizona and its dissolution in the state of its domicile (admitted to be a limited dissolution under the laws of California) that it can no longer be sued within the State of Arizona where it was admitted to carry on business out of which this litigation arises. In the first paragraph of appellee's brief under this specification of error on page 3, appellee admits that both under the laws of California and the laws of Arizona a corporation is not absolutely dissolved but

its existence is continued for the purpose of winding up its affairs.

While appellee questions the effect of the Arizona Constitutional and Statutory Provisions, any doubt in this respect has been dispelled by the enactment of Section 53-309 *A.C.A.* 1939 by the regular session of the Arizona State Legislature of 1947 providing for suits by and against dissolved corporation. (See 1947 Cumulative Pocket Supplement to Arizona Code 1939. This enactment became effective ninety days after its approval by the Governor on March 25, 1947. Statute quoted in appendix hereto.) This statute was recently construed by the Supreme Court of Arizona in the case of *Bates v. Mitchell* (Arizona), 192 Pac. (2d) 720, 722 (advance sheets), in which the Court says specifically that the common law rule has been abrogated in this state.

We have read carefully each of the cases cited by appellee to this point and we do not believe the same are applicable or helpful in this case. Nor do we find that the cases support the propositions of law as stated. In each of the cases cited, the foreign corporation sought to be sued was shown to be absolutely dissolved and dead for all purposes. Here we do not have such a situation. The appellee by the force of Section 399 of the California Civil Code, quoted in appendix hereto, is continued in existence for the purpose of winding up its affairs which includes the right to sue and be sued. We, therefore, do not need to depend upon the Statute of Arizona to continue the existence of the appellee corporation for this pur-

pose. In the case of *Partan v. Niemi,* 192 N.E. 527 (Mass.), Annotated 97 A.L.R. 483, the continued existence of a dissolved corporation for the purpose of winding up its affairs is clearly distinguished from the dissolution of a corporation absolutely and by the great weight of modern authority under applicable statutory provisions, the limited dissolution of a corporation continues the existence of such corporation for the purpose of suits and actions which may be brought by or against it in the corporate name. 97 *A.L.R.* 483, Note at 499 (prolonging power to sue and be sued); *Lusk Lumber Co. v. Independent Producers Consol.,* 43 Wyo. 191, 299 Pac. 1044; *Mieyr v. Federal Surety Co.* (1933), 94 Mont. 508, 23 Pac. (2d) 959; *Ray v. J. I. Case Plow Works Co.* (Okla.), 37 Pac. (2d) 598; *The Greyhound* (C.C.A. 2), 68 Fed. (2d) 832, 834.

The case of *Frazier v. Steel and Tube Co.,* 132 S.E. 723, 45 A.L.R. 1442, and annotated cases clearly shows the law to be that where a foreign corporation qualifies to do business in a state having statutory provisions such as found in Arizona and appoints a statutory agent therein, the appointment of such agent is irrevocable and actions by citizens of that state upon causes of action arising in that state may be brought there and service of process be made upon the statutory agent after the withdrawal of such foreign corporation from the state.

The question of continuing or reviving actions by or against a corporation after its dissolution depends upon the laws of the state in which the action is

pending, and a foreign statute relating thereto is of no avail. 1 *C. J.* 137; *Sturges v. Vanderbilt,* 73 N.Y. 384; *Sinnott v. Hanan,* 156 App. Div. 323, 141 N.Y.S. 505; *Wamsley v. Horton,* 12 App. Div. 312, 42 N.Y.S. 767; *Mieyr v. Federal Surety Co.* (1933), 94 Mont. 508, 23 Pac. (2d) 959.

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(3) SPECIFICATION OF ERROR NO. 2—THE QUASHING OF SERVICE AND RETURN OF PROCESS UPON ARIZONA CORPORATION COMMISSION.

Appellee argues that notwithstanding the fact that the trial Court had granted its motion to quash service of process upon its statutory agent in Arizona that the service made upon the Arizona Corporation Commission is ineffective because the officer making the return on that service did not make affidavit that the appellee did not have an officer or an agent within the state. It is appellant's position that the purpose of the statute in this regard has been fully met under the facts established by affidavits filed by appellee and as shown by the record in this case. In order that there be no question about the appellant having exhausted all possible means of service of process and without waiving its position that the service upon the statutory agent of appellee was effective, it had process also served upon the Arizona Corporation Commission.

(4) SPECIFICATIONS OF ERROR NO 1 AND NO. 2 GENERALLY.

Appellee in its argument under this heading is apparently attempting to place appellant in a dilemma. Without entering into the refined pleasure of gymnastic argument suffice it to say the appellant's first position is that service upon the statutory agent of appellee was good and effective service; however, without waiving its position in this regard and out of caution and with the thought that it might be necessary for the purposes of this case, appellant also had process served upon the Arizona Corporation Commission. If this service upon the Arizona Corporation Commission added nothing to the service upon the statutory agent, it took nothing away from that service. We do not believe this to be an unusual practice and in the event it should be determined that appellee did not have a statutory agent within the State of Arizona upon whom process could be served in this action, then appellee will still be required to answer a suit in this state upon service upon the Arizona Corporation Commission.

It is appellant's position that it should not under the law be required to bring appellee to bay in the state of its domicile and there enforce appellee's alleged liability but that it is entitled to prosecute its action in the State of Arizona where the cause of action arose and that the withdrawal of appellee from the state and its hurried limited dissolution within the state of its domicile was ineffective to revoke its statutory agent's authority within Arizona or to absolutely destroy its life so as to make it incapable of

being sued upon an alleged liability arising in the State of Arizona.

CONCLUSION.

In conclusion, we respectfully submit that the orders quashing the service and return of process should be vacated and the appellee be required to answer appellant's complaint.

Respectfully submitted,
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(Appendix Follows.)

Appendix.

Appendix

Sec. 53-309, Arizona Code 1939 (1947 Cumulative Pocket Supplement to Arizona Code, 1939).

"Continued existence for purpose of suit.—As used in this section:

'Dissolved corporation' means a corporation which has ceased to exist.

'dissolution' means any termination of existence.

'suit' means a proceeding by which a legal or equitable remedy is pursued in a court of record.

(b) A dissolved corporation may be sued in its corporate name upon any cause of action which, but for such dissolution, would have accrued against it. No suit, action or proceeding to which a dissolved corporation is a party at the time of dissolution, shall abate or be discontinued by reason thereof. Execution or process may issue against a dissolved corporation and any order, judgment or decree of court may be enforced against it.

(c) Service of process against a dissolved corporation shall be made by delivering a copy of the summons and complaint, in the order designated, to: 1. any one of the last acting officers or directors; 2. a receiver or person having charge of the assets: 3. a person who, at the time of dissolution, was a duly appointed agent for the service of process or a stockholder, or, 4. if none of such persons can be found, the corporation commission, as prescribed by

section 21-314. A copy of the summons shall be published as provided by section 21-306.

(d) When there is no officer or agent competent to execute on behalf of a dissolving corporation a deed or other instrument relating to property either real or personal, or when a dissolved corporation or its officers do not comply with a judgment or decree of court, or when a court deems it proper, a judgment or decree shall contain a self-executing provision which shall have the effect of the deed or instrument ordered to be executed, or the court may appoint a master to execute the same in the name of the dissolved corporation.

(e) This section shall not be construed to terminate the authority of persons appointed under the provisions of sections 53-306, 53-307 and 53-308. The superior court of the county in which the principal office of a dissolved corporation was located, shall have jurisdiction of suits relating to dissolved corporations. (Code 1939, § 53-309 as added by Laws 1947, ch. 109, § 1, p. 210.)''

* * * * * * *

Sec. 399, California Civil Code. "Continuation of corporation after dissolution: (Omitted assets). A corporation which is dissolved by the expiration of its terms of existence, by forfeiture of existence by order of court, or otherwise, nevertheless shall continue to exist for the purpose of winding up its affairs, prosecuting and defending actions by or against it, and enabling it to collect and discharge obligations,

dispose of and convey its property, and collect and divide its assets, but not for the purpose of continuing business except in so far as necessary for the winding up thereof. No action or proceeding to which a corporation is a party shall abate by the dissolution of such corporation or by reason of proceedings for dissolution and winding up thereof.

Any assets inadvertently or otherwise omitted from the winding up shall continue in the dissolved corporation for the benefit of the persons entitled thereto upon dissolution of the corporation, and on realization shall be distributed accordingly. (Enacted 1872; Repealed by Stats. 1905, p. 563; Added by Stats. 1929, p. 1277; Superseded by Stats. 1931, p. 1762; Added by Stats. 1931, p. 1821; Am. Stat. 1933, p. 1403.)''